Supreme Court, U.S.
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No. 85-1109

In the Supreme Court of the United States

OCTOBER TERM, 1985

MILWAUKEE COUNTY, WISCONSIN, PETITIONER

v.

WILLIAM E. BROCK, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether Section 106(b) of the Comprehensive Employment and Training Act of 197 , 29 U.S.C. (Supp. V 1981) 816(b), which stated that the Secretary of Labor "shall" issue a final determination within 120 days of the receipt of a complaint alleging the unlawful use of CETA funds by a grant recipient, barred the Secretary from recovering misused grant funds when he failed to issue a final determination within the 120-day period.

2. Whether the Secretary of Labor correctly found that petitioner violated the "maintenance of effort" requirements applicable to CETA grant recipients.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-39) is reported at 771 F.2d 983. The opinion of the administrative law judge (Pet. App. 45-151) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 42) was entered on August 6, 1985, and a petition for rehearing was denied on September 9, 1985 (Pet. App. 43-44). On November 26, 1985, Justice Stevens issued an order extending the time within which to file a petition for a writ of certiorari to and including January 2, 1986, and the petition was filed on December 30, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Comprehensive Employment and Training Act of 1973 (CETA), 29 U.S.C. (Supp. V 1981) 801 *et seq.*, authorized the Secretary of Labor to grant federal funds to qualified entities, such as states and local government units, for programs "provid[ing] job training and employment opportunities for economically disadvantaged, unemployed, or underemployed persons." 29 U.S.C. (Supp. V 1981) 801; see also S. Rep. 95-891, 95th Cong., 2d Sess. 4, 42-43 (1978); H.R. [illegible]-659, 93d Cong., 1st Sess. 1-3 (1973).[1] The statute [illegible]me was carefully constructed to ensure that programs financed with CETA funds would further the purposes of the Act. Thus, the statute prescribed detailed eligibility standards for participants in CETA programs and set forth the terms and conditions governing the employment of such program participants. See 29 U.S.C. (Supp. V 1981) 823-827; see also 20 C.F.R. 675.5 *et seq.*, 676.21 to 676.30a, 676.51 to 676.76. Each grant recipient was required to submit assurances that its program would comply with all applicable statutory and regulatory requirements (29 U.S.C. (Supp. V 1981) 813(a)(21)). These conditions included a set of "maintenance of effort" requirements designed to ensure that a grant recipient would use CETA funds to supplement—and not replace—local funds expended in providing similar jobs or public services. See, *e.g.*, 29 U.S.C. (1976 ed.) 845(c)(8) a[illegible]d (25), 848(a)(1)(C), 983(7) and (11); 29 C.F.R. 96.24, 97.334, 99.34 (1977).[2]

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[1]The statu[illegible] originally was enacted in 1973 (Pub. L. No. 93-203, 87 Stat. 839 *et se*[illegible] and was amended substantially in 1978 (Pub. L. No. 95-524, 92 Stat. 1909 *et seq.*). The CETA was repealed effective October 13, 1982, and replaced by the Job Training Partnership Act, 29 U.S.C. 1501 *et seq.* (see Pub. L. No. 97-300, § 184(a)(1), 96 Stat. 1357). However, the CETA continues to govern administrative or judicial proceedings pending on September 30, 1984 (29 U.S.C. 1591(e)).

[2]The conduct that forms the basis for the finding that petitioner violated the maintenance of effort requirements occurred prior to the

The statute provided that the Secretary of Labor could conduct audits of grant recipients "[i]n order to assure that funds provided under [the CETA] are used in accordance with its provisions" (29 U.S.C. (Supp. V 1981) 835(a)).[3] In addition, the statute permitted any interested person, such as a program participant, to file a complaint with the Secretary alleging that a grant recipient had failed to comply with CETA standards (29 U.S.C. (Supp. V 1981) 816).

Section 106(b) of the Act, 29 U.S.C. (Supp. V 1981) 816(b), stated that if the Secretary obtained information—either as the result of an audit or through the receipt of a complaint—concerning a grant recipient's failure to adhere to the Act's requirements, the Secretary was required to investigate the matter. The same provision then stated that "not later than 120 days after receiving the complaint," the Secretary "shall" make a "final determination" regarding the allegation involved (*ibid.*). If after notice to the grant recipient and an opportunity for a hearing, the Secretary found that the grant recipient violated the CETA's requirements, the Secretary expressly was authorized to order the

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effective date of the 1978 CETA amendments. The substantive provisions of the 1973 statute therefore apply in this case. Pet. App. 3 n.1; see *Bennett* v. *New Jersey*, No. 83-2064 (Mar. 19, 1985).

[3]Typically, an audit was performed or arranged by the Department of Labor's Office of Inspector General and the audit report was forwarded to the Department of Labor grant officer responsible for the particular grant. The grant officer provided the grant recipient with an opportunity to comment on the report, issued an initial determination, offered to attempt informally to resolve the dispute, and then issued a final determination. 20 C.F.R. 676.86(d), 676.88. The grant recipient was entitled to a hearing before an administrative law judge (ALJ) with respect to the grant officer's final determination. The ALJ then rendered a decision that, if not modified or vacated within 30 days, became the final decision of the Secretary. A decision adverse to the grant recipient or another interested person was subject to judicial review in a court of appeals. 29 U.S.C. (Supp. V 1981) 816(b), 817(a); 20 C.F.R. 676.88 to 676.92.

grant recipient to repay any misspent funds to the United States. 29 U.S.C. (Supp. V 1981) 816(b) and (d).

2. Beginning in the 1930's, petitioner operated programs funded with local revenues that provided work experience jobs to recipients of general assistance; during the 1970's, this program was known as the "Pay for Work Program" (PFWP). The PFWP "provided 550 to 750 minimum-wage positions, primarily within the county government, for individuals who would otherwise be receiving cash welfare grants." Pet. App. 15-16.

During the first half of 1977, petitioner began planning new CETA-funded programs to provide training and work experience to individuals eligible for general assistance—the same class of individuals served by the PFWP. These CETA programs, "Learn-to-Earn" and "Handicapped Serving the Handicapped," began operation in July 1977; in early 1978, they were merged to form the "Work Assistance Program" (WAP). The WAP was funded by local revenues and the CETA grants received by petitioner. It served the same general assistance population as the earlier CETA programs. Pet. App. 17-18, 50-51.

During the second half of 1977—when the CETA programs were getting underway—petitioner began to refer fewer general assistance applicants seeking employment to the PFWP; petitioner instead referred such applicants to the CETA-funded programs (Pet. App. 18). The PFWP was discontinued completely in 1978; all eligible applicants then were referred to the CETA-funded WAP (*id.* at 18, 124). Thus, in 1976—the year before petitioner began using CETA funds to provide job training and work experience positions for persons receiving general assistance—petitioner spent $3,014,580 on the PFWP. Petitioner's expenditures of local funds for these purposes decreased to

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$2,097,428 in 1977 (for the PFWP) and to $2,732,487 in 1978 (for the PFWP and the local share of the WAP) (*id.* at 16, 19, 115, 127).

3. Several complaints were filed with the Department of Labor in 1978 alleging that petitioner had violated a variety of statutory and regulatory requirements in connection with its expenditures of CETA funds (Pet. App. 46-48). The particular claim that is relevant here was that during 1977 and 1978 petitioner violated the CETA maintenance of effort requirements by substituting CETA grants for local funds that otherwise would have been spent to create work experience positions for individuals eligible for general assistance (*id.* at 2-3, 109-114).[4] Following an investigation, the grant officer issued a final determination on January 4, 1980, almost two years after the initial complaint was filed, stating that petitioner had not violated the maintenance of effort requirements by eliminating the locally-funded PFWP and replacing it with the CETA-funded WAP (*id.* at 3, 114).[5]

The complainants sought review of the grant officer's determination before an administrative law judge (ALJ). The ALJ reversed the grant officer's determination regarding the maintenance of effort issue (Pet. App. 124-127). He found that "[t]he record leaves absolutely no doubt that the major purpose of the WAP was to save [petitioner] tax levy dollars previously spent on both General Assistance and the PFWP by creating a new employment and training

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[4]The other allegations included, for example, claims that program participants were not notified of their rights under the CETA program (Pet. App. 48-49), that ineligible participants had been hired by petitioner (*id.* at 55), and that petitioner paid program participants improperly low wages and benefits (*id.* at 63).

[5]The grant officer did find that petitioner violated these requirements by displacing eight staff employees of the PFWP when that program was replaced by the WAP (Pet. App. 113).

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program for General Assistance eligibles to be supported by Federal CETA dollars. The substitution of the CETA funded WAP for the County funded PFWP did result in the substitution of Federal for other funds in connection with work that would otherwise be performed" (*id.* at 123-124). The ALJ further found that "[t]here is no question that the WAP was the functional replacement for the PFWP in Milwaukee County—both provided work experience jobs for General Assistance eligibles in lieu of cash grants. This functional equivalence is sufficient to make the two programs comparable for purposes of determining possible maintenance of effort violations" (*id.* at 124).

In ascertaining whether petitioner violated the maintenance of effort requirements by replacing the PFWP with the WAP, the ALJ selected 1976 as the base year for assessing petitioner's expenditures of local funds because "it was the most recent year in which no CETA money was expended on the General Assistance program" (Pet. App. 126-127). Comparing petitioner's 1976 expenditure for job training for general assistance recipients with petitioner's expenditures for that purpose in 1977 and 1978, the ALJ found that petitioner "failed to maintain effort in those years"; petitioner's expenditures fell by a total of $1,199,245 from their 1976 level (*id.* at 127). As the remedy for this violation of the maintenance of effort requirements, the ALJ disallowed an equal amount of petitioner's CETA costs and ordered petitioner to repay that sum to the United States (*id.* at 127, 148).

The ALJ also determined, in reviewing the complainants' allegations that the Department of Labor did not process their complaints in a timely manner, that the time taken by the grant officer to issue the final determination in this case was "not unreasonable" (Pet. App. 137). He observed that the grant officer's investigation was extremely time consuming because "[t]he complaints in this case were far more

numerous and more complex than the typical CETA complaints," and noted that the grant officer conducted interviews of 67 persons (*id.* at 136). The ALJ found, moreover, that the legislative history of the 1978 CETA amendments—which included Section 106(b)—indicated that the 120-day limit for the issuance of a final determination by the grant officer "was not intended to be jurisdictional in nature" (Pet. App. 137). The ALJ's decision became the final decision of the Secretary (see 20 C.F.R. 676.91(f)), and petitioner sought judicial review in the court of appeals pursuant to 29 U.S.C. (Supp. V 1981) 817.

4. The court of appeals affirmed by a divided vote (Pet. App. 1-39). The court unanimously held that the Secretary's failure to issue a final determination within the 120-day period set forth in Section 106(b) did not bar the Secretary from recovering misused grant funds (Pet. App. 4-15). The court noted that the 1978 CETA amendments—which included Section 106(b)—were "intended to give the Secretary greater power to prevent and correct the fraud and abuse that had developed in CETA programs" (Pet. App. 5). The court observed that in view of this legislative background "it would indeed be incongruous to conclude that Congress would have the Secretary divested of jurisdiction under § 106(b) when he does not render his final determination within four months of the receipt of the complaint" (*id.* at 8). The court further noted that the sponsor of the House floor amendment that became Section 106(b) expressly declared that the provision was not intended to limit the Secretary's jurisdiction (Pet. App. 6-8). Finally, the court stated that its interpretation of Section 106(b) was supported by the rule that a statutory time limitation relating to government action is not jurisdictional unless it both expressly requires an agency to act within a particular time period and specifies a consequence for failure to comply with the time limitation (Pet. App. 9, 11-12).

The court of appeals remarked that the complexity of the present case "vividly illustrates why the 120-day limit cannot be construed as jurisdictional" (Pet. App. 9). It found that "[t]he requirement of a final determination from the Grant Officer in 120 days under these facts would be a practical impossibility at best, and the effect of such a construction would be to remove completely disputes of this kind from the Secretary's jurisdiction and to extinguish absolutely the claims of innocent complainants, even though they were in no way untimely or at fault in initiating the action" (*id.* at 10-11).

With respect to the merits of the Secretary's decision, the court of appeals held that petitioner violated the maintenance of effort requirements applicable to CETA grantees (Pet. App. 15-24). The court first found that the Secretary correctly determined that 1976 was the appropriate base year for determining whether petitioner violated the maintenance of effort requirements because it was "the most recent year in which no CETA money was expended" to provide job training and work experience (Pet. App. 22). The court observed that the maintenance of effort inquiry focuses on the "level of funding," not on the "number of individuals in a given program" (*ibid.*). If petitioner had maintained its expenditures of local funds at the 1976 level "some portion of the work-experience positions and public services provided by the [CETA-funded programs] would * * * have been funded by non-federal money. Because [petitioner] did not [maintain this local funding], work and services were performed as a result of the substitution of federal funds for non-federal funds" (*ibid.*). The court held that this substitution of CETA funds for local funds violated the maintenance of effort requirements.

The court of appeals rejected petitioner's contention that its decreased expenditure of local funds in 1977 was justified because it was the result of petitioner's decision to reduce

PFWP employees' wages and hours as permitted by this Court's decision in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), overruled, *Garcia* v. *San Antonio Metropolitan Transit Authority*, No. 82-1913 (Feb. 19, 1985), and did not reflect a reduction in the number of individuals participating in the PFWP. The court first noted that petitioner's rationale explained only 71% of the shortfall in expenditure of local funds for 1977 and 1978 (Pet. App. 23). It found that, in any event, petitioner "cannot discharge its obligations under CETA by simply retaining the same number of employees at a reduced annual salary while using CETA funds to provide employment for similarly situated individuals" (*ibid.*). The court observed that petitioner "did in fact originally intend to expand PFWP in 1977 with a considerably larger budget, but subsequently reduced the program * * * after it was known that CETA funds were available" (*id.* at 24). The court concluded that petitioner therefore could not rely upon the lower wages permitted by *National League of Cities* to explain its budget reduction.[6]

Judge Coffey dissented with respect to the maintenance of effort issue (Pet. App. 34-39). He concluded that petitioner had instituted "cost-saving measures" in 1977 when it reduced its employees' wages and hours (*id.* at 36-39). In his view, the majority's approach penalized petitioner by requiring it "to use the [cost] savings to employ more general assistance welfare recipients in its own program" (*id.* at 38).

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[6]The court also affirmed the Secretary's disallowance of costs for 17 program participants who did not satisfy CETA eligibility standards (Pet. App. 28-31), and the award of backpay to a PFWP employee (*id.* at 31-33). The court modified the Secretary's determination regarding the propriety of the wages and benefits paid by petitioner to CETA employees (*id.* at 24-28).

ARGUMENT

1. The first question presented in this case is the same as the issue now before the Court in *Brock* v. *Pierce County*, cert. granted, No. 85-385 (Nov. 4, 1985); *i.e.*, whether Section 106(b) of the 1978 CETA bars the Secretary of Labor from recovering misspent CETA funds when he fails to issue a final determination within 120 days.[7] Here, the court of appeals upheld a determination of the Secretary directing the repayment to the United States of misspent CETA funds despite the fact that the Secretary did not issue a final determination within 120 days. We demonstrated in our brief in *Pierce County* (at 11-32) that this interpretation of Section 106(b) is correct because it accords with a settled rule of statutory construction as well as the explicit legislative history and purposes of the CETA. With respect to this question, therefore, the Court should hold the petition for a writ of certiorari pending its decision in *Pierce County*.

2. The court of appeals' decision upholding the Secretary's finding that petitioner violated the CETA maintenance of effort requirements does not conflict with any decision of this Court or any other court of appeals. Further review of this fact-bound issue is not warranted.

We note at the outset that the CETA has been repealed (see note 1, *supra*), and that the specific question presented here is therefore of limited future significance. Petitioner asserts (Pet. 14) that the court of appeals' decision "raises important and recurring problems" concerning the interpretation of maintenance of efforts requirements under other statutes, but it cites no decisions in any way indicating that there exists a dispute about the meaning of such statutory requirements.

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[7]We have served counsel for petitioner with a copy of our brief in *Brock* v. *Pierce County*.

Moreover, the decision of the court of appeals is correct. The CETA contained "a number of 'maintenance of effort' provisions designed, in general, to require CETA grantees to use CETA funds to create *new* employment and training opportunities, to guard against the displacement of current civil-service employees, and to ensure that federal grants [were] not substituted for local funding of the same jobs or public services." Pet. App. 20 (emphasis in original; footnote omitted); see 29 U.S.C. (1976 ed.) 845(c)(8) and (25), 848(a)(1)(C), 965(b), 983(7) and (11); 29 C.F.R. 96.24, 97.334, 99.34 (1977). These maintenance of effort requirements furthered Congress's intent to *increase* employment opportunities for the persons served by the statute. See S. Rep. 95-891, 95th Cong., 2d Sess. 42-44 (1978); H.R. Conf. Rep. 94-1514, 94th Cong., 2d Sess. 16 (1976). Here, the court of appeals upheld the Secretary's determination, based upon record evidence, that petitioner violated the CETA maintenance of effort requirements by reducing its expenditures of local revenues for job training and work experience programs after instituting substantially equivalent programs funded with CETA grants. Accord *Maine* v. *United States Dep't of Labor*, 669 F.2d 827, 830 & n.6 (1st Cir. 1982) (budget data showing decrease in local funding for substitute teachers coincident with increased use of CETA-funded substitute teachers permits inference of maintenance of effort violation).

Petitioner first contends (Pet. 17-18) that the court of appeals erred by using 1976 as the base year for determining whether petitioner had reduced its expenditures of local funds. It is uncontested, however, that 1976 was the last year in which petitioner used only its own funds—and not CETA funds—to provide job training and work experience for persons eligible for general assistance payments (Pet. App. 17-18, 126-127). The very purpose of the maintenance of effort requirements was to ensure that a CETA grant recipient would maintain its pre-CETA commitment to

equivalent programs. The court of appeals therefore correctly held that 1976 was the proper benchmark for purposes of the maintenance of effort determination. Accord *Maine* v. *United States Dep't of Labor*, 699 F.2d at 830 & n.6.[8]

Petitioner also argues (Pet. 19-20) that it did not breach the maintenance of effort requirements because it "did not discharge, lay-off or reduce the hours of any of its locally-funded welfare recipients upon the creation of the supplementary CETA-funded 'workfare' program." As the court of appeals found, however, the maintenance of effort provisions require a sustained level of local funding, not simply the retention of the same individuals in locally-funded jobs. Pet. App. 21-22; see also 29 U.S.C. (1976 ed.) 845(c)(25) (requiring a grant applicant to provide "assurances that jobs funded under this subchapter are in addition to those that would be funded by the sponsor in the absence of assistance under this chapter 11"); 29 U.S.C. (1976 ed.) 983(7) (CETA program may not "result in the substitution of Federal for other funds in connection with work that would otherwise be performed"). Even though petitioner may not have transferred any PFWP participants out of that program in 1977, petitioner conceded that " 'certain CETA-eligible welfare recipients on the "[PFWP] backlog" were enrolled in the CETA-funded * * * programs' " (Pet. App. 21 (citation omitted)). This shifting of the cost of

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[8]Judge Coffey agreed with the majority that petitioner's 1976 expenditure provided the appropriate benchmark (Pet. App. 34).

Petitioner contends (Pet. 17-18) that utilizing as a benchmark the year prior to the year in which federal funds first are received by the grantee would penalize grantees who reduce expenditures for reasons unrelated to the CETA program, but that possibility exists regardless of the year that is selected as the base year. Here, as we discuss below, petitioner cannot justify its reduction in local expenditures on other grounds.

petitioner's longstanding jobs program from local revenues to the CETA program constituted a breach of the maintenance of effort requirements.

Finally, petitioner suggests (Pet. 8, 20-21) that the decrease in its 1977 PFWP budget was justified because the decrease simply reflected a reduction in the benefits paid to the program participants made possible by this Court's decision in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976).[9] The court of appeals recognized, however, that petitioner originally had budgeted $4.2 million for the PFWP "in order to expand the program to 1200 positions" (Pet. App. 17), and that these budget projections took into account the lower minimum wage permitted under *National League of Cities*.[10] It was only after petitioner began to receive CETA funds in mid-1977 that petitioner deleted $2 million from its budget (*id.* at 18, 24). Thus, the court of appeals correctly concluded (*id.* at 24) that "[t]he *National League of Cities* decision may justify the wages and hours of PFWP participants in 1977, but it does not explain why the original 1977 PFWP budget of $4.2 million [which already was calculated based on the lower minimum wage] was ultimately reduced to $2 million when approximately $2 million were spent in the CETA programs in 1977." It seems clear that the reduction in funding was the result of the availability of CETA funds, not the lower wages permitted

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[9]Since the program participants were local government employees, the decision in *National League of Cities* exempted the program participants from federal minimum wage requirements.

[10]In 1977, petitioner intended to pay $2.00 per hour (a base wage permitted under *National League of Cities*) to 1200 participants for a 32-hour work week (Pet. App. 23, 123). Such payments would have totaled $3,993,600 annually, which, when added to administrative costs, amounts to the $4.2 million that petitioner originally budgeted for 1977.

under *National League of Cities.*[11] Petitioner's purported justification therefore cannot excuse its failure to comply with the maintenance of effort obligations imposed upon grant recipients under the CETA program.[12]

CONCLUSION

As to Question 1, the Court should hold the petition for a writ of certiorari and dispose of it as appropriate in light of the decision in *Brock* v. *Pierce County, supra.* In all other respects, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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[11] Judge Coffey did not address these facts regarding petitioner's 1977 budget in his dissenting opinion.

[12] Even assuming that petitioner's invocation of *National League of Cities* could constitute a permissible justification for the local funding decreases, that rationale explained only 71% of the shortfall in petitioner's expenditures of local funds for 1977 and 1978 (Pet. App. 23).